IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 711 of 1991
With
CRIMINAL APPEAL No. 712 of 1991

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	
5	Whether it is to be circulated to the civil judge ?	

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PATEL BABUBHAI ISHWARLAL & 1 - Appellant(s)
Versus
STATE OF GUJ. - Opponent(s)

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Appearance :

MR KB ANANDJIWALA for Appellant(s) : 1 – 2 in Criminal Appeal No.711 of 1991.

MR RJ GOSWAMI for Appellant :1 in Criminal Appeal No.712 of 1991.
MS DARSHANA S. PANDIT, LD.APP for Respondent in both the appeals.

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 12/12/2006

COMMON ORAL JUDGMENT

1. These two appeals are arising out of the judgment and order of conviction and sentence

dated 09th September, 1991, passed by the learned Special Judge, Mehsana, at the conclusion of the trial of Special ACB Case No.2 of 1989. The said judgment and order of conviction and sentence under challenge is assailed by the orig.accused persons (hereinafter referred to as 'the accused') on various grounds as mentioned in paragraph no.4 of the memo of the appeals. Before the learned trial Judge the orig.accused nos.1 and 3 (hereinafter referred to as 'the accused nos.1 and 3') and orig.accused no.2 (hereinafter referred to as 'the accused no.2') were defended by different counsel and these accused had placed their defence before the learned Special Judge slightly in a different way. The accused nos.1 and 3 are the appellant of Criminal Appeal No.711 of 1991 and accused no.2 is the appellant of Criminal Appeal No.712 of 1991. The learned trial Judge while appreciating the evidence led by the prosecution, keeping in mind the charge Ex.14, held all the three accused guilty of the charge of offence punishable under Section 7 read with Section 12 of the Prevention of

Corruption Act, 1947 (hereinafter referred to as 'the Act') and also under Section 114 of the Indian Penal Code. The accused nos.1 and 2 are sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs.1000/- and in default to undergo rigorous imprisonment for six months. However, the accused no.3 is sentenced to undergo rigorous imprisonment for one year and to pay a fine of Rs.100/- and in default to undergo rigorous imprisonment for six months. The amount of fine imposed by the learned trial Judge has been paid by the accused. At present all the accused are on bail.

2. I have heard Shri K.B. Anandjiwala, learned counsel appearing for the accused nos.1 and 3, and Shri R.J. Goswami, learned counsel appearing for the accused no.2. I have also heard Miss Darshana Pandit, learned Additional Public Prosecutor, appearing on behalf of the respondent-State. The learned counsel appearing for the accused have taken me through the oral as well as documentary evidence led during the course of trial and

the judgment and order of conviction and sentence under challenge. It is the say of the accused that the finding recorded by the learned trial Judge suffers from various infirmities and it based on incorrect appreciation of evidence. The learned trial Judge has failed in appreciating the defence plea taken up and has ignored some relevant documentary evidence and the deposition of Shri J.B. Patel, Deputy Engineer at Ex.7. It is submitted that it was sufficient to record acquittal of all the three accused from the charges levelled against them. For the sake of brevity and convenience, it would be appropriate to state the gist of the charge framed against the accused vide Ex.14, which is read over before this Court, is as under :

> *"(1) On 19.11.1987, you accused no.1 Babubhai Ishwarbhai Patel and you accused no.2 Ranchhodbhai Bechardas Patel, were performing your duty in the Gujarat Electricity Board as Accountant and Junior Engineer and as per your said post, you nos.1 and 2 are public*

servant.

(2) The complainant-Manilal Jethidas had obtained an electricity connection in his factory namely Ram Industry in the name of his wife Pashiben. You no.2 were checking as to whether the complainant is using the additional load of electricity or not and for making the said checking in favour of the complainant, you accused nos.1 and 2 were demanding an amount of Rs.2500/- and after deciding to settle the same at Rs.1200/- after due discussion, as per the said discussion an amount of Rs.500/- was accepted by you no.1 in presence of you no.2.

(3) As stated hereinabove, as decided earlier, you accused no.1 along with your brother accused no.3 had gone to the shop of the complainant on 19.11.1987 to accept the amount of Rs.700/-. As you accused no.1 had asked for the amount, the complainant had given the same. As you accused no.1 had

told you accused no.3 to accept the said amount, you accused no.3 had accepted the amount of Rs.700/-.

(4) As stated hereinabove, you accused persons had demanded an amount of Rs.1200/- immorally, for your personal gain, and not towards your legal dues from the complainant and by accepting the said amount in two parts as Rs.500/- and Rs.700/-, by misusing the post of public servant and by misconducting, you accused nos.1 and 2 have committed an offence punishable under Section 7 of the Prevention of Corruption Act within the jurisdiction of this Court; as well as in the very event, by going along with your brother and by accepting the remaining amount of Rs.700/- as per the say of accused no.1 in view of earlier demand as stated hereinabove to the tune of Rs.1200/-, you accused no.3 have committed an offence punishable under Section 7 of the Prevention of Corruption Act and/or Section 114 of

the Indian Penal Code read with Section 12 of the Prevention of Corruption Act."

3. It is submitted by Shri Anandjiwala that in sum and substance, the acceptance of amount of Rs.700/- by the accused no.3, was not seriously disputed by the accused no.3 and it is never admitted by any of the accused indirectly that the muddamal currency notes of Rs.700/- were ever passed to the accused no.3 as the amount of bribe or illegal gratification, and therefore, there was no scope to raise any presumption against any of the accused mainly the accused nos.1 and 2 being the public servants merely on the ground of defence plea taken of acceptance of amount by the accused no.3. It is not a matter of dispute that the accused nos.1 and 3 are the real brothers and the accused no.1 at the relevant point of time was serving in the Account Branch of the office of the Gujarat Electricity Board, City Sub-Division Office, Mehsana. The accused no.2 was the Junior Engineer in the very office. The complainant-

Manilal Jethidas, with the assistance and help of his son-Rambhai was running the industry in the name and style of 'Ram Industries' and dealing in fabrication of various materials from metal mainly iron; and this industry was being run on the electricity supplied by the Gujarat Electricity Board and the electric connection was obtained by the complainant in the name of Pashiben Manilal i.e. wife of the complainant-Manilal Jethidas, and she is the mother of PW-Rambhai Manilal as well as PW-Harish Manilal.

4. This industry was visited by the Electrical Inspector of State of Gujarat on 23rd September, 1987 and it was noticed by the said Inspector that the said industry of the complainant is using additional load than the sanctioned one. The statement of PW-Rambhai Manilal was recorded which was in the nature of admission on the very day of inspection/checking by the Electrical Inspector and in turn, it was sent to the office at Mehsana. As per the system worked out, the office of the Gujarat Electricity

Board of City Sub-Division office was to confirm the correctness of the report submitted and to do needful in the matter if it is found that the fact of using the additional load by the consumer is correct. According to prosecution, on 13th/14th November, 1987, the accused nos.1 and 2 had been to the industry of the complainant with the report received by them from the Electrical Inspector and had threatened him of issuance of supplementary bill to the tune of Rs.5000/- for using the additional load and at that time they demanded an amount of Rs.2500/- by way of bribe/ illegal gratification and the complainant was induced that if he pays the said amount, they may help the complainant and tear the the paper i.e. checking sheet prepared by the accused no.2-Junior Engineer because it was found that the consumer is using additional load than sanctioned and on the strength of the said checking sheet, the complainant was threatened of issuance of supplementary bill of Rs.5000/-. It is alleged by the prosecution that the complainant had agreed, after negotiations to

pay an amount of Rs.1200/- against the demand of Rs.2500/- and thereafter, on 17th November, 1987, the orig.accused no.1 had demanded the amount of Rs.500/- from the complainant at the grocery shop of Harish (PW-5) son of complainant. The said shop is situated in the outskirts of town Mehsana.

5. Shri Anandjiwala and Shri Goswami, learned counsel appearing for the accused, both have drawn the attention of the Court to the fact that there is no specific charge of the alleged wrong committed by the accused nos.1 and 2. On the contrary, paragraph no.2 of the charge framed to some extent is misleading and one incorrect fact is stated in the charge. It is not specifically stated even in the charge that the accused nos.1 and 2 had visited the industry either on 13th or 14th. It is not even mentioned that the amount of Rs.500/- was collected by accused no.1 from the complainant from the shop of Harish on 17th November, 1987 and though it is not the case of the prosecution that the amount of Rs.500/- allegedly accepted by accused no.1 was

accepted in the presence of accused no.2, it is mentioned in the charge which gives an impression that the amount of Rs.500/- was accepted by the accused nos.1 and 2 both, as if both had gone together to collect the amount of bribe/ illegal gratification. As per the say of the prosecution, the remaining amount of Rs.700/- was to be paid to the accused persons on 19th November, 1987. It is neither the case nor the evidence that on the day of trap i.e. on 19th November, 1987, the accused no.2 had accompanied the accused no.1. It is also not the case that the amount was accepted by the accused no.1 from the complainant on the date of the trap. It is alleged that the amount of bribe was tendered to accused no.1 by the complainant but the complainant was asked to hand over the amount to the person accompanying the accused no.1. The person accompanying the accused no.1 who had gone to the shop of PW-Harish along with accused no.1 on a two-wheeler at about 02-30 p.m. for collecting the amount of bribe was the accused no.3, i.e. real brother of the accused no.1.

6. Shri K.B. Anandjiwala, learned counsel appearing for the accused nos.1 and 3, has placed detailed arguments on the point of law as well as facts, which can be summarised as under :

(i) This is a case of false implication of the accused nos.1 and 3, and mainly accused no.1 because the accused nos.1 and his real brother accused no.3, had some dispute with PW-Rambhai regarding refund of amount of deposit given to PW-Rambhai-son of complainant-Manilal Jethidas and accused no.1 had never demanded any amount of bribe or illegal gratification in the capacity of a public servant.

(ii) The versions of complainant-Manilal Jethidas and PW-Harish-his son, do not get corroboration from the evidence of PW-Rambhai-son of complainant, who was really looking

after the business of fabrication and Ram Industry, whose load was checked by the Electrical Inspector and, thereafter by the accused no.2.

(iii) The accused no.1, being a person serving in the Account Section of the Gujarat Electricity Board, had no business to check any meter or connection including the load capacity of any customer including small industry and, there is no evidence of satisfactory nature on record to show except the bare words of the complainant that the accused no.1 had been to Ram Industry for checking of load either on 13th or 14th November, 1987. On the contrary, there is clinching evidence to show that the factory of the complainant was checked for the purpose of verification to ascertain the correctness of the report made by

the Electrical Inspector on the basis of the checking made by that officer on 23rd September, 1987. One document ex.31 produced by the prosecution clearly shows that on 23rd September, 1987, the Electrical Inspector had inspected and checked the Ram Industry consuming electricity energy from the electricity connection sanctioned in the name of Pashiben Manilal Patel having Consumer No.1533/I-800. This consumer Pashiben was authorised to use the electrical energy by fixing the maximum load of 15 H.P. However, on that day the electricity motors and heater, etc. attached were of 19.50 H.P. One Shri Suresh Patel was also present, whose signature has been obtained while obtaining “Kabulatnama” of the consumer. On 23rd September, 1987, when the Electrical Inspector had visited the Ram Industry, PW-Rambhai Manilal-son of the

complainant, was present and he had signed the “Kabulatnama” on behalf of the consumer Pashiben Manilal. It is in evidence that over and above fabrication activities carried out in the said industry of the complainant, one diamond polishing work was also being done on the first floor. There was no separate connection for the said unit and that unit was using electricity motors, etc. from the very electricity connection sanctioned in the name of Pashiben and this fact situation has come on record. So anticipating some penal action including issuance of supplementary bill, the complainant had probably developed ill-feeling against the Gujarat Electricity Board and that too with the concerned Engineer and Account Department.

(iv) There is conflict of evidence as to

the exact date of visit by the accused no.2 for the purpose of checking as to actual load attached with the connection. If the say of the complainant is that either on 13th or 14th, the accused nos.1 and 2 had been to his industry for the purpose of checking, then the evidence available on record showing the visit of accused no.2 for the very purpose at the industry of the complainant on 17th November, 1987, would adversely affect the case of the prosecution. It is the say of the complainant that on 17th November, 1987, out of the alleged amount of bribe/illegal gratification of Rs.1200/-, an amount of Rs.500/- was recovered by the accused no.1 from the shop of PW-Harish. It is neither the say of the complainant nor the case of the prosecution that the accused no.2 had checked the industry on 17th November, 1987. When it is the

say of the complainant that at the time of checking, the accused nos.1 and 2, both had threatened him for issuance of supplementary bill for using the additional load of 4.50 H.P. against the actual load sanctioned, then it is inferable that the amount must have been asked by the accused persons either on 13th or 14th November, 1987. Therefore, the oral evidence of the complainant as to demand of bribe and acceptance of amount of Rs.500/- from the grocery shop of PW-Harish, is in conflict to one important documentary evidence i.e. checking-sheet prepared by accused no.2 at Ex.32. This document bears the date of 17th November, 1987. Of course, there is no signature of any panch or witness but when genuineness of this document is confirmed by one another prosecution witness i.e. Shri J.B. Patel, Deputy Engineer, the learned

trial Judge ought not to have inferred anything against the accused no.1 or accused no.2 that this document was prepared for the sake of preparing it, otherwise it was to be torn of after getting the amount on bribe/illegal gratification.

(v) The complainant was habitually violating the conditions of agreement as to use of electricity. Once he was found involved in electricity theft and, therefore, he was compelled to deposit some amount with the Gujarat Electricity Board. Of course, there is no documentary evidence as to on how many occasions he was reprimanded and asked to pay the amount in addition to the regular bill for violating the rules and regulations and/or agreement. But it is admitted by the complainant himself that he has been penalised by the

Gujarat Electricity Board for irregularities on more than one occasion. This time the irregularity was noticed by Electrical Inspector who is an independent machinery established by the State, and this statutory authority is sending report of checking made, to the sub-station office of the Gujarat Electricity Board, so that the Gujarat Electricity Board can take appropriate steps to put the things in order and to realise the amount, if the Gujarat Electricity Board is otherwise entitled to. The document at Ex.31 is not disputed by the complainant. This document was seized during the course of drawing of panchnama in the present case and the same has been tendered in evidence by the prosecution. So it is possible to infer that the checking carried out by the accused no.2 is nothing but a confirmation

of the wrong found by the Electrical Inspector and in such a situation there was no scope for the Gujarat Electricity Board Officers including the accused nos.1 and 2 to help the complainant in any manner. The accused no.1 has no authority whatsoever to oblige any consumer. He cannot grant concession or offer any special privilege because he has to prepare bills in accordance with the reports submitted by Technical Section, meaning thereby, from the Engineers, to the Account Section. The Gujarat Electricity Board is arranging for sudden checking, directly through the Divisional Office or the Head Office and for that purpose, such Checking Squads are being sent in different areas consisting team of officers. In the present case, the connection of the complainant was neither checked by the Checking Squad, at the instance

of the Divisional Office or Head Office nor the accused no.2 was heading such a squad. The evidence available on record mainly of Shri J.B. Patel, Deputy Engineer, clearly shows that the accused no.2 was sent with the Checking Squad to assist the Checking Squad in the area under the City Sub-Division, Mehsana town on 13th November, 1987. The Checking Squad was there at Mehsana town and it is in evidence that the accused no.2 had left the Head Quarter on 14th November, 1987 being a non-working Saturday. It is deposed by the said Shri J.B. Patel, Deputy Engineer, that as the accused no.2 had left the Head Quarter on 14th November, 1987, he had performed the duties required to be performed as technical person including the work of distribution of duties to technical staff,etc. The complainant, therefore, only has not given the exact date and

time of visit by accused nos.1 and 2, as no such visit of Ram Industry was made by accused nos.1 and 2 jointly. Two documents i.e. test-sheet-Ex.56 dated 13th November, 1987, show that the checking squad visited two different consumers and both these reports clearly show that on that day i.e. on 13th November, 1987, High Tension Consumers were checked. To believe the version of the complainant, firstly the Court shall have to draw inference that on 13th November, 1987, the accused no.2 had separated from the Checking Squad so that he can go to Ram Industry of the complainant with accused no.1 and prepare the checking-sheet Ex.32. For want of any cogent and convincing evidence, such an inference cannot be drawn. On the contrary, the learned trial Judge ought to have said that the document Ex.56 cuts the case of the

prosecution as to presence of accused no.2 at Ram Industry. The industry of the complainant was not industry having any High Tension connection and the accused no.2 was not there in the Head Quarter at all. The accused no.1 being a person serving in the Account Section, it was allegedly inferable that he might not have gone to his office. When Shri J.B. Patel, Deputy Engineer (PW-7) has not been controverted by the Public Prosecutor appearing in the trial, his evidence should not be viewed with doubt. So there is no clear cut evidence even to show that the accused nos.1 and 2 both jointly had visited the Ram Industry either on 13th or 14th November, 1987. There is no convincing corroboration even from PW-Rambhai-son of the complainant as to the visit of accused nos.1 and 2 to Ram Industry on 13th or 14th November,

1987 and it would not be safe for this Court to rely on the evidence of the complainant to believe the case of demand of bribe during the time of those two days. It is alleged by the complainant that initially an amount of Rs.2500/- was demanded but after negotiations, the amount was settled at Rs.1200/-. He has not even named the accused exactly as to who quoted the amount of Rs.2500/- initially and why the place other than the Industry itself was fixed for accepting the amount of bribe, is also not explained by the complainant in a satisfactory manner. Undisputedly, the PW-Harish was not present when the amount of bribe of Rs.2500/- was demanded and the arrival of settlement at Rs.1200/-. In the same way, the evidence of Harish is also hazy qua the acceptance of Rs.500/- on 17th November, 1987

because he has not stated anything in paragraph no.2 of his examination-in-chief that after leaving of the person who had accepted the amount from the complainant-father of PW-Harish, whether he had any conversation with his father about the reason of paying the amount or identity of the accused including the name, etc. On the contrary, it emerges from the conversation between the complainant and the person who had accepted the amount of Rs.500/- that the remaining amount shall be paid within a day or two; and between 12-00 hrs. and 13-00 hrs., the father of PW-Harish would be available at their grocery shop and he should come during that hour. At that time, the said person who had accepted the amount had said that any one of them would come. Here it is necessary to mention the words used by this witness in the

vernacular Gujarati language because it is possible to infer more than one meaning of those words, which are as under :

> “Temne e vakhte em kahelun ke game te ek bhai leva aavshe”.
>
> (***Translation*** *: “At that time, it was told that “any one person”/”any one brother” will come to receive.”)*

According to the learned Additional Public Prosecutor, the Court should interpret the aforesaid words as *“either accused no.1 or accused no.2, any of these two would come to collect the amount”.* On the other hand, the say of Shri Anandjiwala and also of Shri Goswami is, *“any of the two brothers either accused no.1 or accused no.3 would come to collect the amount”*, because the words *“ek bhai”* carries two different

meanings. It conveys (i) “any one person” and, (ii) “one of the brothers”. The person who had come to accept an amount of Rs.500/- was accused no.1, was learnt by this PW-Harish subsequently and that too after completion of trap arranged on the strength of the complaint. Before arrival of accused nos.2 and 3 to the shop where the father of PW-Harish was sitting. PW-Haresh had left the shop for having his lunch and before he could return after lunch, the trap was over. Thereafter, he had learnt that the person who had accepted the amount of Rs.500/- was one of those persons who was sitting in the inside room which was there behind the shop and at that time, he also learnt about the name of the person who had accepted the amount of Rs.500/- as 'Babubhai' i.e. accused no.1.

(vi) It is also argued that if the amount which was to be paid was a bribe amount, some discussion at least must have taken place between the complainant and his son Harish-PW-5 and he also could have given response during the conversation when his father was conveying to the visiting persons that he has not been able to arrange for the total amount at present. So the Court should look to the conduct of the witness and his attempt to keep himself away conveniently. Both the occasions make the deposition of this witness-Harish risky to be believed and hence, it would be risky to place reliance on the deposition of Harish.

(vii) It is further argued that the learned trial Judge has completely ignored the evidence of Rambhai-PW-6, son of the complainant, who is actually engaged in carrying out

the business of Ram Industry. It is true that general supervision of the business was of the complainant but day to day work at the spot was being carried out by PW-Rambhai. This witness Rambhai has not been declared hostile and during the course of cross-examination, he admitted that they are accepting 25% amount as deposit from whomsoever comes with the order of fabrication and the amount of deposit is being adjusted at the time of final payment. He has also stated that if the consumer fails in taking delivery of the material ordered, then they are forfeiting the deposit and he is knowing the details and maintaining the account of such deposits and his father does not know anything in this regard. He has also stated in the cross-examination that Ratibhai i.e. accused no.3, had ordered for some work of fabrication but he had

failed in taking the delivery and, therefore, his deposit was forfeited. However, he had continued his demand for refund of deposit. He has also shown ignorance as to whether he had informed his father about repeated demands of accused no.3 for refund of deposit. This witness has said that they would not like to refund the amount of deposit. According to him, the accused no.3 had paid an amount of Rs.1000/- towards deposit, but ultimately it was decided to return the amount of Rs.700/-. This witness has not stated anything about the checking that had taken place at the factory either on 13th, 14th or 17th November, 1987. This witness has stated that the industry of fabrication is running in the name and style of 'Ram Industry' and the industry is named after him. There was no reason to discard the

evidence of this witness while evaluating the evidence led by the prosecution qua demand of bribe/ illegal gratification by mentioning one line in the judgment that the evidence of Rambhai-PW-6 is not found trustworthy, and thereby, the learned trial Judge has committed a gross error and it has resulted into serious consequence of conviction.

(viii) The learned trial Judge ought to have held that there is no evidence of cogent nature whereby it can be said that the prosecution has established either demand or offer in the entire transaction.

(ix) One legal argument advanced by Shri Anandjiwala and also supported by Shri Goswami, is that all the accused persons have suffered serious prejudice because the investigation in the present case

was carried out by the Police Sub-Inspector posing himself to be In-charge Police Inspector of Anti Corruption Bureau (ACB) Police Station. As per the scheme of the Act, the Police Sub-Inspector was not authorised to lay a trap and/or investigate the crime. In the present case, the investigation from its initiation i.e. from the time of taking the complaint and concluding the investigation, was carried out by the Police Sub-Inspector. So the papers ought to have been sent to the higher officers of the accused nos.1 and 2 to accord sanction to prosecute the accused nos.1 and 2. So the ratio of the decision in the case of ***Muni Lal v. Delhi Administration, reported in AIR 1971 SC 1525***, would help the accused. In this decision, the Apex Court has considered its two earlier decisions in the case

of ***State of M.P. v. Mubarak Ali, reported in AIR 1959 SC 707,*** and in the case of ***H.N. Rishbud and another v. State of Delhi, reported in AIR 1955 SC 196***. Shri Anandjiwala has taken this Court through all the aforesaid three decisions and the scheme of Section 5(A) of the Act. The non-obstante clause of sub-section (1) of Section 5(A) of the Act makes the provision mandatory and the provisions of the said Section 5(A) of the Act are mandatory, is a settled legal position and as per the first proviso, sub-section (1) of Section 5(A) of the Act is relevant for the present case. For the sake of brevity and convenience, I would like to reproduce sub-section (1) of Section 5(A) of the Act read over before this Court, as under :

"5(A): Investigation into cases under this Act *:-*

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898), no Police Officer below the rank :

(a) in the case of the Delhi Special Police Establishment, of an Inspector of Police;

(b) in the Presidency-towns of Calcutta and Madras, of an Assistant Commissioner of Police;

(c) in the Presidency -town of Bombay, of a Superintendent of Police; and

(d) elsewhere, of a Deputy Superintendent of Police;
shall investigate the any offence punishable under Sec.161, Sec.165 or Sec.165-A of the Indian Penal Code,

1860 (Act XLV of 1860 or under Sec.5 of this Act, without the order of a Presidency Magistrate or a Magistrate of the First Class, as the case may be, or make any arrest therefore without a warrant;

Provided that if a Police Officer not below the rank of an Inspector of Police is authorised by the State Government in this behalf by general or special order, he may also investigate any such offence without the order of a Presidency Magistrate or a Magistrate of the first class, as the case may be, or make arrest therefore without a warrant;

Provided further that an offence referred to in Cl.(e) of sub-section (1) of Sec.5 shall not be investigated

without the order of Police Officer not below the rank of a Superintendent of Police."

(x) It is argued that this proviso should be read in reference to sub-section (1) of Section 5(A) of the Act in stricto senso and the Court should hold that the law laid down by the Apex Court in the case of H.N. Rishbud (supra) would help the accused.

(xi) It is further submitted by Shri Anandjiwala that the observations made by the Apex Court in the case of ***State of Rajasthan v. Shambhugiri, reported in 2004(8) SCC 169***, also would help the accused. Of course, the decision of the Rajasthan High Court has been turned down by the Apex Court, however, the observations made by the Apex Court in paragraph nos.7 and 8 of the cited decision are

relevant for the present case. The Apex Court has quoted the relevant provision of Section 5(A) in paragraph no.6 of the decision. The learned counsel defending the accused no.2 had preferred one application Ex.33 before the learned trial Judge stating that the investigation by a Police Sub-Inspector may result into serious prejudice to them. But the learned trial Judge instead of dealing with the said application Ex.33 on merit, has conveniently postponed the decision with final disposal of the matter by a cryptic small non-speaking order. According to Shri Anandjiwala, the learned Presiding Judge could have permitted the prosecution to rectify the mistake, if committed, or the negative finding could have given an opportunity to the accused no.2 to assail the finding to the higher forum, meaning thereby, this Court.

Surprisingly, the learned trial Judge has not dealt with this important legal point at all. It is not possible to infer as to whether such an important point missed out of the mind of the learned trial Judge that he has to record the finding on the application filed by the accused no.2 vide Ex.33 or he has avoided the finding. In such a situation, this Court should quash and set aside the judgment and order of conviction and sentence saying that the investigation by a Police Sub-Inspector has caused a serious prejudice to the accused persons; and by not doing the same, the learned trial Judge has made multiplications of prejudice.

(xii) Shri Anandjiwala has also placed reliance on the decision in the case of ***Kanubhai Kantibhai Patel v. State of Gujarat, reported in***

1998(1) GLH 924, wherein this Court has observed that the cases where the complainant had motive to implicate the accused in the crime and where there is no sustainable evidence as to demand, mere acceptance of amount would not constitute the offence because the prosecution is supposed to prove that the acceptance of amount was against the demand of illegal gratification and the amount accepted by the accused is the amount of illegal gratification/ bribe and not on any other count.

In the present case, if the evidence of PW-Rambhai is considered, the case of prosecution becomes doubtful and it is specifically established that the complainant had inimical feelings against the accused persons and the persons working with the Gujarat Electricity Board because the power

supply of the complainant was disconnected on more than one occasion because of the wrong committed by the complainant. So the ratio of the above cited decision would be against the prosecution.

(xiii) Shri Anandjiwala has also placed reliance on the decision in the case of ***Gopal Lal Ghisulal Chhipa, reported in 1998 (1) GLH 943,*** which would help the accused persons. The prosecution as per the cited decision was supposed to prove the demand and acceptance by leading cogent and convincing evidence.

In the present case, neither the motive for demand has been proved nor there is any evidence of convincing nature proving the demand and acceptance of the amount of Rs.500/-. The accused no.1

himself has not accepted any amount. The amount was accepted by accused no.3 because he was entitled to have that amount as refund of deposit, as per the facts admitted by PW-6 Rambhai. So there is no element in the case of prosecution wherein the Court can assume that the case of prosecution is worthy of credence. On fact when the demand and acceptance are not found established, the conviction should be set aside. For this purpose, Shri Anandjiwala has taken this Court through paragraph nos.10, 11, 12 and 13 of the above cited decision and it is also argued that the observations made by the Court in the very decision in paragraph no.8 also should be considered because an unauthorised officer of the rank of Police Sub-Inspector had carried out entire exercise of investigation and credibility of such an officer is

certainly doubtful and the prosecution case must fail on the strength of the ratio of the decision in the case of ***Bhagwan Singh v. State of Rajasthan, reported in AIR 1976 SC 985***.

7. Shri R.J. Goswami, learned counsel appearing for the accused no.2, has placed detailed arguments on the point of law as well as facts, which can be summarised as under :

(i) A serious prejudice has been caused to the accused no.2 because no responsible officer has investigated the crime. Even as per the case of the prosecution, there is ample evidence to show that the accused no.2 had not visited the factory of the complainant either on 13th or 14th November, 1987.

(ii) There are documentary evidence to show that the accused no.2 had left

the Head Quarter on 14th by seeking oral permission from his superior i.e. Shri J.B. Patel, Deputy Engineer (PW-7).

(iii) The papers of checking sheet were kept by accused no.2 till 19th November, 1987 and the prosecution has attempted to show that they were retained by the accused no.2 only with a view to see that they can be torn off, if he gets signal from the accused no.1 about realisation of the amount decided i.e. the amount of Rs.1200/- because the checking was done on 17th November, 1987, as such there was no checking technically from the Gujarat Electricity Board's point of view. A visit was paid by the accused no.2 on 17th November, 1987 in compliance of the direction given to the Electrical Inspector and the 'Kabulatnama' given by PW-Rambhai-son of consumer Pashiben

Manilal, and there was no reason for him to take the accused no.1 with him to the factory. The Account Section of the Gujarat Electricity Board is altogether a different department. Merely because the table of the officials are nearby would not increase their criminal liability and no inference against the accused normally should be drawn in absence of any cogent evidence. So the arguments advanced by Shri Anandjiwala should be accepted on this point, otherwise the accused no.2 ought not have shown these papers i.e. including the charge-sheet of the visit of the factory of the complainant on 17th November, 1987. The raid was carried out in the afternoon on 19th November, 1987. The relevant documents including Ex.33, checking sheet of the factory of the complainant are sealed in the later part of the day and these documents

were lying with him at the instance of his superior Shri J.B. Patel, Deputy Engineer. He was to tender all the checking-sheets including Ex.32 to Shri J.B. Patel, Deputy Engineer, on his return from leave but Shri Patel had asked him to retain those papers. So when the superior was informed about the steps taken by the accused no.2, no adverse inference ought to have been drawn by the learned trial Judge against the accused no.2. The accused no.2 may not be even knowing anything about the dispute which had cropped up between the accused no.3 and son of the complainant. To implicate the accused no.1, it appears that the accused no.2 has been falsely implicated by creating a story of visit of the factory by accused nos.1 and 2 on 13th or 14th November, 1987. On 14th November, 1987, the accused no.2 was not even in Head

Quarter and on 13th November, 1987 he was with the checking squad sent by the Head Quarter.

(iv) No amount, as per the case of the prosecution, has been accepted by the accused no.2; even he had not accompanied accused no.1 on any of these two occasions when actually the amount was received.

(v) Mostly the arguments advanced by Shri Anandjiwala have been accepted by Shri Goswami and it is argued that the investigation carried out by the Police Sub-Inspector Madansinh Takhatsinh Rana-PW-8 being an unauthorised, the Court presumes that a prejudice is caused to the accused, especially when the learned trial Judge has not even cared to decide the application Ex.33. As Shri Rana was interested in the success of the trap arranged by him, he has failed in preparing

objective report. If the Police Inspector was not present in the Police Station, then after completing the trap, he ought not to have investigated the crime any further. Thereafter, a senior officer with an objective mind after calculating all documentary evidence and looking to the total gamut ought not to have even filed charge-sheet or the sanctioning authority ought not to have issued sanction. The Court should consider the deposition of PW-Rambhai and Shri J.B. Patel, Deputy Engineer, in its correct and legal perspective. It is clear from the judgment of the trial Court that very relevant part of the deposition of these two witnesses has been conveniently ignored at the time of recording the finding of guilt. For short, it is submitted that the judgment and order of conviction and sentence

passed by the learned trial Judge is required to be quashed and set aside.

8. Miss Darshna S. Pandit, learned Additional Public Prosecutor, has resisted both the appeals and it is submitted by her that there is sufficient strength in the case of the prosecution and the Court should look the following aspects :

(i) It is submitted that the report of the Electrical Inspector Ex.31 had given an opportunity to the accused persons to exploit the situation and the Accountant is very much concerned in calculating the amount of supplementary bill to be collected for the purpose of using the additional load.

(ii) There was ample scope for the accused to go to the Industry of the complainant even after office hours and, therefore only, they

have not mentioned the exact time of preparation of checking-sheet and avoided the entry of the date; and there is no reason for the Court to disbelieve the complainant that the amount of Rs.2500/- was demanded by the accused from him.

(iii) There is sufficient evidence of settlement at Rs.1200/- between the accused nos.1 and 2 on oneside and the complainant on the other.

(iv) When the say of the complainant as to acceptance of the amount of Rs.500/- by the accused no.1 is corroborated by the evidence of PW-Harish, the Court should hold that the demand has been proved and that the visit was the foundation stone for fixation of the date and time as to when the remaining amount asked was to be paid.

(v) The visit by the accused no.1

during office hours at the shop of PW-Harish, when the complainant was present, by itself was a guilty conduct and an important circumstance against the accused no.1, and this conduct should be read in reference to the conversation that had taken place between him and the complainant in the present case of independent witness namely the Panch.

(vi) There is no reason for the Court to discard the evidence of panch witness and the words used by the accused no.1, whereby he has referred to the word 'Saheb', who is nobody but the accused no.2. The learned trial Judge has rightly considered the totality and this Court also should consider the language used by the accused no.1 during conversation whereby he has said that “he will have to reply to the 'Saheb'”. The word 'Saheb' is

used in reference to accused no.2 and the discussion was regarding illegal gratification only and there was no question of thinking of refund of deposit amount.

(vii) The defence plea is vague and no documentary evidence is produced as to the placement of order, etc. But here it would be necessary for this Court to mention that the evidence of PW-Rambhai reveals that each document pertaining to orders was maintained by him and there is nothing in his evidence that invoices were being issued by his industry to the customers.

(viii) The Court should not presume in favour of the accused no.2 merely because Shri J.B. Patel, Deputy Engineer, has stated that he was entrusted some other work on 13th November, 1987 to the accused no.2. The demand made by the accused was

against the legal obligation and the acceptance of the amount in presence of the Panch proves the demand impliedly. In absence of any earlier conversation, the figure of Rs.700/- would not have reached and the act of accused no.1 to direct the complainant to hand over the muddamal currency notes to accused no.3 i.e. real brother of accused no.1, is guilty conduct; otherwise there was no reason for accused no.1 to do so and he himself could have accepted the said amount and he would not have inquired about the identity of the Panch. So the visit of the accused no.1 along with his brother accused no.3, to the shop of PW-Harish was because of the settlement arrived at earlier and the intimation given at the time of accepting part payment of Rs.500/-.

(ix) There is sufficient evidence of

passing of muddamal currency notes. It was even seen by the Investigating Officer. There is no evidence as to the inimical terms between the accused no.1 and the complainant, and therefore, the learned trial Judge has rightly raised presumption against the accused and the learned trial Judge has also rightly observed that the defenceside has not rebutted the presumption by giving satisfactory details and evidence, and the defence taken by the accused is vague and ambiguous. The visit by accused nos.1 and 2 to the factory of the complainant was not a formal checking. It was simply a verification and they were supposed to check the genuineness of the report submitted by the Electrical Inspector and on confirmation, they could have issued the supplementary bill or could have imposed any other penal action. So the so-

called non-availability of accused no.2 for this work emerging from the evidence of Shri J.B. Patel, Deputy Engineer, would not help the accused.

(x) The date mentioned of '17th November, 1987' in Ex.32 may have been put any time prior to seizure of the document. The attempt of Shri J.B. Patel, Deputy Engineer, appears to be helping the person from his department and, therefore, the learned trial Judge has appreciated the evidence of PW-Rambhai and Shri J.B. Patel accordingly, and no error can be said to have been committed in discarding the evidence by the learned trial Judge in the background of the other evidence led by the prosecution.

(xi) For short, it is submitted by Miss Darshna S. Pandit that the appeal

should be dismissed. The evidence of panch witness should not be rejected merely because he is the Government employee in view of the ratio of the decision in the case of Gopal Lal Ghisulal Chhipa (supra)(Head Note 'A').

9. While appreciating the aforesaid arguments, the Court firstly should look at the submissions made on the strength of the evidence of PW-6 Rambhai and PW-7 Shri J.B. Patel, Deputy Engineer because it has specifically emerged from the evidence of the complainant that he might have developed inimical feelings towards the officers of the Gujarat Electricity Board.

10. In view of the evidence discussed hereinabove, while referring to the arguments advanced by Shri Anandjiwala and Shri Goswami, it is doubtful to accept that any visit was paid for the purpose of checking of the industry of the complainant either on 13th or 14th November, 1987 because it is stated by PW-7 Shri J.B.

Patel, Deputy Engineer, that checking of the factory of the complainant was carried out because the checking report was received from the Electrical Inspector dated 23rd September, 1987 at Ex.31. It was to be verified by the Gujarat Electricity Board officers whether he had continued the wrong found by Electrical Inspector and in view of eventuality, it is possible for the officer of the Gujarat Electricity Board to disconnect the power supply of the complainant. In the cross-examination, this witness has stated that on 16th to 18th November, 1987, he was on leave. On 14th November, 1987, he had performed duties and in support thereof he has produced one document Ex.55. On 13th November, 1987 the accused no.2 had performed duties with the Checking Squad and he was sent with the Checking Squad and the checking by the Special Squad was going on till 06-00 p.m. There is no evidence on record to show that on 13th November, 1987, the accused no.1 had left his office during office hours and that too with the accused no.2; otherwise some statements from the persons serving in the very office

could have been recorded. When on 13th November, 1987, the accused no.2 was with the Checking Squad, there was no scope for the accused no.1 to accompany him to the factory of the complainant. There is no evidence to show that the Account staff has any concern with the checking activities so that the consumer can be given supplementary bill on the spot; otherwise such an evidence could have been brought on record. This witness Shri Patel has stated in the cross-examination that on 19th November, 1987 on completion of his leave, he had resumed his duties in normal course, meaning thereby, since morning and the accused no.2 was also present on his duty and at that time PW-7 Shri J.B. Patel was informed by the accused that he has checked the electricity connection of Pashiben Manilal. The papers of checking were with accused no.2 and this witness has told the accused no.2 to keep those papers with him and further told that he would call for those papers later on. The documents Ex.56 and 57 have been tendered by this witness in evidence. These documents are genuine. There is no scope of concoction

because more than one person has signed these documents. The document Ex.56 shows that on 13th November, the consumers having high tension connection were checked by the Checking Squad. More than 5 persons have signed the document Ex.56 and one of the officers is Deputy Engineer, M.T. Laboratory, Sabarmati, including the representative of the consumer. The another document attached with Ex.56 on page 152 of the paper-book, is also signed by more than 4 persons including the Deputy Engineer of M.T. Laboratory, Sabarmati. So when the oral version of this witness clearly indicates that the papers recovered from the accused no.2 were kept by him at the instance of his superior, then it would not be possible for the trial Court to infer anything adverse on this count against the accused no.3. It is true that this document has not been signed by any panch or witness. It does not bear the time of checking and no date is mentioned in the beginning of the checking-sheet. But it is also not possible for this Court to comment that the date '17th November, 1987' shown in the document visibly under the

signature was placed subsequently at any time prior to its seizure to make this Court believe that the date reflected in the checking-sheet of 17th November, 1987 is a creation and in reality the checking-sheet was prepared either on 13th or 14th November, 1987, then the prosecution should bring sufficient evidence of convincing nature and that evidence is missing.

11. The evidence of panch witness clearly supports the case of the prosecution and the panch witness has said that he was sitting on the opposite side of the complainant at the shop of PW-Harish and was acting as per the instructions given by the trapping officer. He was able to get one thing clear that there was some conversation and settlement about checking carried out earlier. The complainant was insisting for papers prepared by the accused persons and the complainant was interested in seeing that the papers prepared are torn and at that time the accused no.1 was giving assurance to the complainant that he should trust him for the purpose and he should

feel assured that the papers would be torn. The hammer is given by the learned Additional Public Prosecutor on this part of evidence and it is submitted that this evidence is sufficient to establish the guilt of the accused. It is not necessary to prove the exact date of demand. The hidden element of demand can be said to have been established. The amount is undisputedly recovered from the accused no.3. The accused no.3 is the real brother of accused no.1. The argument of learned Additional Public Prosecutor is that there was no reason for the accused no.1 to be there at the shop of PW-Harish during office hours. So the involvement of accused no.1 in the offence can be said to have been established beyond reasonable doubt. These two important circumstances are sufficient to draw inference against the accused no.1 that he had been to the shop of PW-Harish to accept the pre-decided amount. The another conduct of the accused no.1 which has come on record is that he had asked the complainant to hand over the amount to accused no.3. If the amount is really the amount of refund of deposit, there

was no reason for the accused no.1 to hand over the said amount to accused no.3. The accused nos.1 and 3 are real brothers and now-a-days the Government servants are adopting such practices and the amount of bribe/illegal gratification is being accepted either by close friends or family members. Merely because the accused no.3 is not a public servant, the accused no.1 should not be given a clean chit. The presence of accused no.2 is not required to be established at the spot because there is no convincing evidence of the complainant that he was a party present at the factory when the bribery amount of Rs.2500/- was demanded and ultimate settlement of Rs.1200/- was made. It is true that the panch witness has stated about conversation which had taken place between the complainant and the accused no.1 about tearing off the papers of checking. What weightage should be given to this part of evidence, is the question. The evidence of panch witness in this regard can be said to have been corroborated by panchnama Ex.37. As per the settled legal position, the panch witness is not a trap witness and he is

an independent person and it is also settled that merely because he is a Government employee, his deposition should not be viewed with doubts on the ground that under pressure they are deposing before the Court as per the wish and documents prepared by the Investigating Agency. In the same way, the testimony of a panch witness being a Government employee cannot be rejected merely on the ground that he being a Government employee would not be independent and would support the case of the any how under the fear of departmental action, as relied upon by the learned Additional Public Prosecutor on the strength of the observations by this Court in the case of Gopal Lal Ghisulal Chhipa (supra). Neither there is any submission before this Court nor it is argued seriously before the trial Court on the point that selection of the panch witness in the present case would not be an independent selection and the panch witness examined by the prosecution is not a credit-worthy person. He had no reason to support the complainant on the point of conversation that had taken place after arrival of the accused

persons on 19th November, 1987. The time stated by the panch witness also tallies and the amount tendered by the complainant in presence of panch witness whether was refund of deposit or amount of bribe, can be inferred from the evidence of panch witness. The panch witness has negatived the suggestion that he had got an impression that the amount of deposit is being refunded during conversation. So if the version of the panch witness is accepted as trustworthy and reliable piece of evidence, then it can be said that so far as the demand made on 19th November, 1987, is concerned, and the evidence as to the acceptance of the amount by the accused no.3, the complainant gets corroboration from this witness. It is settled that in a bribery case, even if the complainant does not support the case of the prosecution on the strength of the deposition of the panch, the accused can be held guilty. Here the evidence is such that passing of currency notes was seen by the Police Inspector himself as he was standing away from the shop in the near vicinity. But when the accused nos.1 and 3 have accepted that the

muddamal currency notes were received as they were given against the deposit lying with PW-Rambhai, the suggestion or admission made by the accused should not be viewed with prejudice and mere acceptance of amount or recovery of the amount will not be sufficient to raise presumption against the accused. The defence of the accused on preponderance of probability needs appreciation and if the Court finds that the explanation tendered by the accused persons is plausible, then it can be held that the presumption has been successfully rebutted.

12. One probability, which has emerged from close reading of the evidence, is the report of Electrical Inspector made wherein the accused nos.1 and 2 had no voice. They may not be even aware that the Electrical Inspector i.e. State Officer, would inspect the industry and check the load used by the industry of the complainant on 23rd September, 1987 and the Engineer of City Sub Division Office, Gujarat Electricity Board, Mehsana, was supposed to check the load of the industry of the consumer

Pashiben Manilal. So non-refund of deposit leading to some dispute with the brother of the accountant of the same office i.e. Gujarat Electricity Board, may have tempted the accused no.1 to misuse his office and putting some pressure indirectly and by showing some apprehension of serious consequence, he might have tried to get refund of deposit out of way and against the norms which were maintained by the Ram Industry as said by PW-Rambhai, son of the complainant and on that count, there might have some conversation in the nature that had taken place at the time of tendering the muddamal currency notes or muddamal thereof. There are two probable views. The accused no.1 being a person conscious that the amount demanded is a bribe amount, instead of accepting the amount personally, he had asked the complainant to hand over the amount to accused no.3 and he might have taken his brother with him only for that purpose; otherwise during office hours there was no reason for the accused no.1 to go to the shop of PW-Harish with his brother. The other parallel and possible view is that as the

amount was of accused no.3 and he was entitled to have that refund amount of deposit given by him, the accused no.1 might have asked the complainant to hand over the amount the person who is really entitled to receive the same. So when both these views are possible in light of the admission made by PW-Rambhai and other fact situation that the accused no.1 was not legally in a position to tear off the papers, the accused no.2 independently could have done that. But as per the evidence of the prosecution, prior to raid by ACB on 19th November, 1987, the accused no.2 had informed only his superior i.e. Shri J.B. Patel, Deputy Engineer, about checking done by him of the electricity connection of consumer Pashiben in compliance of the direction given by the Electrical Inspector. So only with a view to get the amount of deposit back, the accused no.1 may have given some false assurance. Legally speaking, this conduct of the accused no.1, for exercising his office as public servant and an attempt to see that his brother gets the amount of deposit back, can be said to be a consideration and an illegal

gratification within the meaning of the Act. It is settled that it is not necessary a public servant demanding and/or accepting the bribe must have authority to do something favourable to the accused. It is sufficient to prove that the accused by misusing his office and the status of a public servant indulges in the activity which can be said to be a corrupt practice within the meaning of the Act and other provisions of the Indian Penal Code and the accused no.1 could have been held guilty for the offence punishable under Section 5(A) (1) of the Act and the accused no.3 could have been held responsible as abettor. But for that the prosecution is supposed to place that case against the accused persons. Neither the prosecution can construct totally a fresh new case against the accused persons pending trial gradually during recording of evidence nor the Court can carve out an independent case of different kind or nature. While appreciating the case of the prosecution, it is settled legal position of our criminal jurisprudence that the prosecution case should stand on its own footing and substantially pleaded before

the Court. The crime is to be established beyond doubt as per the charge framed against the accused. The accused cannot be held guilty on any fresh and for different grounds or causes. So it will not be legally possible for this Court to hold that even acceptance f deposit if is believed, then the method adopted by the accused nos.1 and 3 for the purpose with the help of accused no.2 is a corrupt practice. The acceptance of amount of Rs.700/- on 19th November, 1987 was an illegal gratification and was not a mere refund of deposit.

13. Miss Darshna S. Pandit, learned Additional Public Prosecutor, has not successfully convinced the Court as to why the evidence of PW-Rambhai and Shri J.B. Patel, Deputy Engineer, should be ignored for linking the accused with the crime and the accused should be held responsible only on one circumstance i.e. nature of conversation that had taken place at the shop of PW-Harish-son of the complainant, while passing the muddamal currency notes.

14. Here the Court would like to refer to the observations made by the Apex Court in the case of ***Raja Ram v. State of Rajasthan, reported in 2005(5) SCC 272***, wherein the Apex Court has held that the evidence of prosecution witness not supporting the prosecution case can be made use of by the defenceside. In this decision, PW-8 Dr.Sukhdevsinh, who was one of the neighbours, had testified contrary to the case of the prosecution. The learned Public Prosecutor in the trial Court did not obtain permission from the learned trial Judge to treat this witness as hostile and as he was not declared hostile, the Court observed that *"now it is the evidence of PW-8 which is binding on the prosecution absolutely no reason, much less any good reason has been stated by the Division Bench of the High Court as to why PW-8's testimony can be sidelined."* This very judgment has been followed in subsequent judgments of the Apex Court in ***Mukhtiar Ahmed Ansari v. N.C.T. of Delhi, reported in AIR 2005 SC 2804***. For the sake of brevity and

convenience, I would like to reproduce the relevant paragraph nos.29, 30 and 31 of the cited decision as under :

> *"29. The learned counsel for the appellant is also right in submitting that even on merits, the Designated Court committed an error in convicting the appellant. The counsel submitted that kidnapping-case of Ved Prakash Goel resulted into acquittal by a competent court. The said decision is final. In view of acquittal of the appellant, it was not open to the Designated Court to reconsider the matter by doubting the decision or commenting upon it observing that the acquittal was undeserved or unwarranted and the appellant-accused had committed the offence with which he was charged.*
>
> *30. In support of the argument, the learned counsel referred to a decision of this Court in Pritam Singh and another v. State of Punjab, AIR*

1956 SC 415. In that case, one P was prosecuted under the Arms Act for possessing a revolver without holding valid licence. He was, however, acquitted by a competent court. Subsequently, he was tried on the charge of murder. The prosecution wanted to rely on recovery and factum of possession of revolver which resulted in acquittal in an earlier case. It was held that the doctrine of autrefois acquit would apply.

31. Referring to a leading decision of the Judicial Committee of the Privy Council in Sambasivam v. Public Prosecutor Federal of Malaya, 1950 AC 458, this Court said :

> *"The acquittal of Pritam Singh Lohara of that charge was tantamount to a finding that the prosecution had failed to establish the possession of the revolver Ex. P-56 by him. The possession of that revolver was*

a fact in issue which had to be established by the prosecution before he could be convicted of the offence with which he had been charged."”

15. In view of the above settled legal position, it is possible for this Court to observe that the learned trial Judge was not justified at all in saying in one line that the evidence of PW-Rambhai is not acceptable. While accepting the evidence or rejecting the evidence of a witness examined during the course of trial, the Court is supposed to assign reasons. There are no adequate reasons in the judgment under challenge for not accepting the say of PW-Rambhai who has clearly supported the defence theory and on the ground of deposition of Rambhai, it was possible for the accused persons to say that there is no legal convincing evidence on record to show that the amount parted with by the complainant to accused no.3 was the amount of bribe/illegal gratification. So the case would become a case of mere recovery of amount by the accused no.3

and mere recovery, as a settled legal position, is not sufficient to raise presumption. Alternatively, it is also possible for the accused to argue that even if the acceptance of amount is held to be proved and two possibilities are emerging then the evidence of Rambhai ought to have been considered to be a piece of evidence supporting the explanation given by the accused and the explanation of the accused, therefore, was required to be accepted as plausible and on preponderance of the probabilities, the accused were required to be given benefit of doubt. When two views are possible, the view favourable to the accused normally should be accepted and the learned trial Judge has ignored all these aspects.

16. In view of the above entire gamut of oral as well as documentary evidence, when the evidence of panch witness about conversation, of course, is not found condemnable, the Court finds that part of evidence is inadequate to link the accused with the crime. Adequacy of evidence is always insisted upon by the

Criminal Courts and therefore, the evidence of complainant and panch witness about conversation reflected in the panchnama Ex.37 and told by panch witness is not found sufficient in view of the other probabilities successfully established by the defenceside.

17. In the present case, the Court also finds that the investigation carried out by the officer of the rank below the rank of Police Inspector has resulted into prejudice to the accused. In the case of H.M. Rishbud (supra), the Apex Court has observed in paragraph no.8 as under:

> "8. ... ...*Thus, under the Code investigation consists generally of the following steps : (1) Proceeding to the spot, (2) Ascertainment of the facts and circumstances of the case, (3) Discovery and arrest of the suspected offender, (4) Collection of evidence relating to the commission of the offence which may consist of (a) the examination of various persons (including the accused) and the reduction of their statements into*

writing, if the officer thinks fit, (b) the search of places or seizure, of things considered necessary for the investigation and to be produced at the trial, and (5) Formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and if so taking the necessary steps for the same by the filing of a charge-sheet under Section 173.

The scheme of the Code also shows that while it is permissible for an officer in charge of a police station to depute some subordinate officer to conduct some of these steps in the investigation, the responsibility for every one of these steps is that of the person in the situation of the officer in charge of the police station, it having been clearly provided in Section 168 that when a subordinate officer makes an investigation he should report the result to the officer in charge of the police station. It is also clear

that the final step in the investigation, viz., the formation of the opinion as to whether or not there is a case to place the accused on trial is to be that of the officer in charge of the police station.

There is no provision permitting delegation thereof but only a provision entitling superior officers to supervise or participate under Section 551.

6. It is in the light of this scheme of the Code that the scope of a provision like Section 5(4) of the Act has to be judged. When such a statutory provision enjoins that the investigation shall be made by a police officer of not less than a certain rank, unless specifically empowered by a Magistrate in that behalf, notwithstanding anything to the contrary in the Code of Criminal Procedure, it is clearly implicit therein that the investigation (in the absence of such permission) should be

conducted by the officer of the appropriate rank. This is not to say that even one of the steps in the investigation has to be done by him in person or that he cannot take the assistance of deputies to the extent permitted by the Code to an officer in charge of a police station conducting an investigation or that he is bound to go through each of these steps in every case.

When the Legislature has enacted in emphatic terms such a provision it is clear that it had a definite policy behind it. To appreciate that policy it is relevant to observe that under the Code of Criminal Procedure most of the offences relating to public servants as such, are non-cognizable. A cursory perusal of Schedule II of the Criminal Procedure Code discloses that almost all the offences which may be alleged to have been committed by a public servant, fall within two chapters, Chapter IX "offences by or relating to

public servants", and Chapter 11 "Offences against public justice" and that each one of them is non-cognizable. (Vide entries in Schedule II under Sections 161 to 169, 217 to 233, 225.A as also 128 and 129).

The underlying policy, in making these offences by public servants non-cognizable appears to be that public servants who have to discharge their functions - often enough in difficult circumstances - should not be exposed to the harassment of investigation against them on information levelled, possibly by persons affected by their official acts, unless a Magistrate is satisfied that an investigation is called for, and on such satisfaction authorises the same. This is meant to ensure the diligent discharge of their official functions by public servants, without fear or favour.

When, therefore the Legislature thought fit to remove the protection from the public servants, in so far as it

relates to the investigation of the offences of corruption comprised in the Act, by making them cognizable, it may be presumed that it was considered necessary to provide a substituted safeguard from undue harassment by requiring that the investigation is to be conducted normally by a police officer of a designated high rank. Having regard therefore to the peremptory language of sub-section (4) of Section 5 of the Act as well as to the policy apparently underlying it, it is reasonably clear that the said provision must be taken to be mandatory. ... ...".

The very decision has been referred to by the Apex Court in its subsequent judgment in the case of Mubarak Ali (supra). In this cited decision, the Apex Court has observed that if the investigation is to be carried out by the officer other than the designated one, the permission from the Magistrate is required to be taken. In this cited decision, the State of Madhya Pradesh had challenged the order

passed by the High Court by way of an appeal under Special Leave, whereby the Madhya Pradesh High Court, Jabalpur Bench, had directed the Special Judge, Indore, to order the District Superintendent of Police to carry out the investigation afresh because the Madhya Pradesh High Court had found that the investigation was not carried out by the officer designated as contemplated under Section 5(A) of the Act. In the present case, an opportunity indirectly was offered by the accused no.2. He had applied to the trial Court to deal with the application Ex.33 as discussed earlier. As he had challenged the validity of the investigation, the Court could have directed for a fresh investigation by the competent authority, at least from the stage of completion of the raid, then there was scope for submission of an objective report by the Investigating Agency as argued by Shri K.B. Anandjiwala. It is not necessary to repeat the points brought before the Court by Shri Anandjiwala and Shri Goswami on this aspect because the same have been mentioned while summarising the arguments advanced

before the Court.

18. In the same way, the ratio of the decision in the case of Muni Lal (supra) also is helpful to the defenceside. The Apex Court in the case of Muni Lal (supra) has observed, “the accused is supposed to convince the Court that some prejudice is caused to him by irregularity in the investigation”. The irregularity in the investigation does not by itself would vitiate the trial unless there is miscarriage of justice. This observation has been made relying upon the the earlier decision of the Apex Court in the case of ***Munnalal v. State of U.P., reported in AIR 1964 SC 28***. It is observed in this cited case that mere fact, that some of the statements are written by sub-ordinate officers at the dictation of the authorised officer does not amount to investigation by an unauthorised officer. So on facts, the Apex Court found that there was no clinching evidence to show that the investigation was carried out by the officer of an inferior rank and it was not that the statement of important witnesses mainly one

important witness was in the hand-writing of the officer of the inferior rank; otherwise it was satisfactorily established by the prosecution that the statements of many witnesses were recorded by the District Superintendent of Police; the search and seizure was also carried out by the District Superintendent of Police, and the District Superintendent of Police was also examined by the trial Court and the Court held on facts, “we are satisfied that the investigation in this case has been conducted not by Ved Prakash Goel Police Inspector but by the competent authority namely the District Superintendent of Police-PW-6”. In the present case, the investigation is carried out from the very beginning till its completion by the Police Sub-Inspector. He was, of course, in-charge of the Police Station but he was neither temporarily promoted to the post of Police Inspector nor posted in that cadre so that he can complete and carry out the investigation of the complaints which the ACB Police Station may receive. Of course, the charge-sheet is filed by the officer of the

rank of Police Inspector, but it is clear that the act of filing of the charge-sheet by Police Inspector, ACB Police Station, is mechanical on receipt of the sanction to prosecute from the competent authority; otherwise the papers for even according sanction were sent by Police Sub-Inspector PW-M.T. Rana. It is not even the claim of any Police Inspector of the ACB that he was a party to the investigation and the services of Police Sub-Inspector simply were requisited. Considering the defence placed by the accused, which is found probable and the presence of accused no.2 at some other place on 13th November, 1987, as he was out of the Head Quarter on 14th November, 1987, as it has come on record through the evidence of Shri J.B. Patel, Deputy Engineer, it is necessary to observe that the act of Investigating Officer Shri M.T. Rana being an officer below the rank of Police Inspector has caused serious prejudice to the accused.

19. The observations made by this Court in the case of Kanubhai Kantilal Patel (supra),

relying upon the decision in the case of Bhagwan Singh (supra), would help the accused because the Police Sub-Inspector who is an unauthorised officer, only with a view to get a favourable result, has not cared to intimate the higher officers, so that the material part of the investigation can be entrusted to the officer not below the rank of Police Inspector.

20. The learned trial Judge has grossly erred in not deciding the said application Ex.3, which has caused serious prejudice to the prosecution. But after lapse of several years, it would not be either legal or justified to order any fresh investigation by the officer of the rank of Police Inspector or any higher officer. This is likely to prejudice both the parties and it shall also result into protraction of litigation with the hanging sword on the heads of accused persons. While passing the final order also, the learned trial Judge has not cared to say that he does not find merit in the investigation and the investigation carried out by the Police Sub-

Inspector cannot be said to be an investigation by an officer authorised to investigate the crime. It was possible for the Police Sub-Inspector to obtain permission from the Magistrate authorised to accord permission prior to laying down the raid and carrying out the investigation, saying that the post of competent officer is vacant for one or the other reasons; otherwise any of the accused persons could have challenged the negative finding recorded below the application Ex.33. So the error of not recording finding on the legal point raised by the accused no.2 at initial stage of the trial goes to the root of the validity of the conviction and it is necessary to observe that investigation by the officer of inferior rank, meaning thereby, an unauthorised officer, coupled with the error committed by the learned trial Judge in not dealing with the application Ex.33 at all, has resulted into serious prejudice and it makes the judgment and order of conviction and sentence bad.

21. In view of above observations and discussion,

the aforesaid both the appeals are hereby allowed. The judgment and order of conviction and sentence dated 09th September, 1991, passed by the learned Special Judge, Mehsana, in Special ACB Case No.2 of 1989, is hereby quashed and set aside. The accused of both the appeals are ordered to be acquitted from the charges levelled against them in respect of the offence in question. The orig.accused nos.1 and 3 are given benefit of doubt as there is no sufficient evidence to show that the amount accepted by the orig.accused no.3 at the instance of orig.accused no.1 was the acceptance of amount of bribe or illegal gratification, and the orig.accused no.2 is given clean acquittal.

All the three accused are also entitled to acquittal on the technical ground as discussed in reference to the authority of investigation by Police Sub-Inspector Shri Rana, and therefore, they are acquitted accordingly.

Order and finding accordingly. The bail bond executed by each accused person stands discharged. The amount of fine paid, if any,

shall be refunded to the respective accused on proper identification.

(C.K. Buch, J)

Aakar